SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1041

DAVID W. WALLACE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below, Jurisdiction, the Statement of Case, and Points Relied On.

Reference is made to the foregoing petition for the statements of opinion below, grounds of jurisdiction, statement of the case and points relied on.

ARGUMENT.

POINT I.

Court erred in holding that Government counsel could not, by consenting to the entry of the order of February 14, 1941, impliedly waive the defense of the statute of limitations, and therefore stipulate the jurisdiction of the Court.

Petitioner has no quarrel with the general proposition that the time limitation, as specified by Congress, for the

bringing of suit against the United States, cannot be abrogated or waived by a government official. Nor does petitioner disagree with the propriety of the decisions of *Finn* v. *U. S.*, 123 U. S. 227, and *Munro* v. *U. S.*, 89 F. (2d) 614, cert. denied 306 U. S. 36, cited in opinion below. However, petitioner does definitely assert that such decisions have no applicability to the facts surrounding the entry of the order of February 14, 1941, because jurisdiction of the subject matter had been acquired, pursuant to the provisions of the Tucker Act, in 1933 (R. 52).

Finn v. *U. S.* and *Munro* v. *U. S.* (*supra*) were situations wherein the original actions were not instituted within the time required by the statute which authorized such suits against the United States.[2] In neither of these cases had the claimants complied with the conditions contained in the statute authorizing suit against the United States; and inasmuch as such compliance was a condition precedent to the acquisition of jurisdiction of the United States, it followed that such actions were not properly before the Court.

The Circuit Court dwelt at considerable length in its opinion in *Hammond-Knowlton* v. *United States,* 121 F. (2d) 192; its suggestions relative to relaxing the rule of stinginess as to the interpretation of the consent to be sued given by statute, as well as the failure of this Court to adopt a more generous attitude, by its denial of certiorari at 302 U. S. 707 (R. 53-55). It requires a severe strain on one's reasoning powers to detect the slightest applicability of that case to our present question. In such case the claim for refund was filed in October 16, 1931; this was rejected and in 1933 taxpayer sued the Collector of Internal Revenue and won. After reversal in the Circuit Court, the lower

---

[2] In *Finn* v. *U. S.*, claim was made for horses sold in 1863; claim was made in 1874; statute required claim to be filed in 6 years.

Munro v. *U. S.* was brought under World War Veterans' Act, and suit was instituted after lapse of time specified therein.

Court, in 1938, permitted an amendment nunc pro tunc, to substitute United States as a party defendant. The Circuit Court reversed because of the running of the statute of limitations.

There, the United States was never served with process at any time; consequently, no jurisdiction could be acquired without such service; also there never was a compliance with the other provisions of the statute, by which the United States consented to be sued.

The aforesaid cases, which the Circuit Court thought controlling in our present case, deal with the question of the utter failure to acquire original jurisdiction of the United States. Such acquisition of jurisdiction is conceded in our present case and the Trial Court could not be divested of its jurisdiction by the entry of an improper order.

The Circuit Court (footnote 3, R. 54) appears to have voiced its opinion that the ruling of this Court in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373 was spasmodic in character because of subsequent decisions. Such criticism appears inconsistent with the expression of this Court in *United States* v. *Shaw*, 309 U. S. 405, wherein it was said at page 501:

> "A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule."

Again it was said at the same page:

> "When authority is given, it is liberally construed."[3]

The Government here did not raise any question as to the jurisdiction of the District Court to either entertain the motion to vacate the order of May 13, 1938 or to grant the order of February 14, 1941 which set aside its previous

---

[3] *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381.

order. It merely argued that the granting of such order would amount to an abuse of the Court's discretionary power (R. 13). Thereafter it prepared and submitted an Agreed Statement of Fact to petitioner's counsel (R. 29; Appendix B and D). Under such circumstances the phraseology of Judge Gardner in *U. S.* v. *Edwards*, 23 F. (2d) 477 at page 480, is pertinent to these facts:

> "A total want of jurisdiction of the subject matter cannot, of course, be waived, but where the court has general jurisdiction of the subject matter, and the jurisdiction of a particular case is dependent upon the existence of certain facts, the jurisdiction may be waived by a failure to make timely and specific objection."

It is undisputed that the Court had jurisdiction of the subject matter, and of the parties, and its jurisdiction extended to entertaining a motion to secure that relief which might be warranted under a writ of coram nobis or coram vobis. Surely, the enactment of the F. R. C. P. did not curtail the jurisdiction of the Court as to such motions.[4]

There was no waiver of original jurisdiction by the Government attorney or of the statute of limitations. The waiver, if such, was merely of the Government attorney's ministerial duty to assert the alleged defense upon the argument of such motion.

A waiver, by Government's attorney, in stipulating a recovery for a refund of taxes on grounds other than those asserted in the taxpayer's claim for refund, was before the Court in *Tucker* v. *Alexander*, 15 F. (2d) 556. The Circuit Court in affirming the lower Court held that it was a required limitation that the action shall be on the same grounds and only such grounds as were set forth in the

---

[4] See *The Bern*, 74 F. (2d) 235 at 237.

claim for refund. This Court, in reversing, 275 U. S. 228, at page 231, said:

> "But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

It was definitely to the interest of the United States that the conceded facts be admitted so that a determination might be made upon the merits. It did not waive any statute of limitation but urged the Court, in the exercise of its discretionary power, to deny the petitioner's application. When the U. S. attorney realized that the Court had decided to vacate the order of dismissal, in the exercise of its discretion, he then consented to the entry of such order on terms that the facts would be stipulated and an early trial would be had (Appendix B, D and E).

Point II.

The Court below erred in holding that the order of February 14, 1941 could not be supported unless it was authorized by Federal Rules of Civil Practice, 60 (b).

Such order provided as follows:

> "Ordered, that the above entitled action be dismissed for lack of prosecution, in accordance with the rules of this Court" (R. 8).

The Circuit Court conceded that there was no dispute that the dismissal order of November 7, 1937, and the formal entry of the same on May 13, 1938, was improper (R. 53).

In view of such concession, recourse is had to Rules XI, XIII and XVI of the Rules of the District Court for the Western District of New York, as well as to Rule 83 of the Federal Rules of Civil Procedure. The local rules were in effect May 1, 1938, and the Federal Rules of Civil Procedure took effect September 16, 1938.

Pursuant to Rule XIII only the petitioner had filed the note of issue for the respective terms of Court, including November 9, 1937 (R. 8).

There was never any contention, on the part of the Government, that the clerk of the Court had mailed the thirty-day notice as provided in Rule XI, and the giving of such notice is a condition precedent to the granting of an order of dismissal, or the entry of such an order as of course by the clerk. It will be observed that if the conditions precedent were properly executed, such an order would be entered, without prejudice.

Inasmuch as such order was improperly granted and entered under Rule XI, recourse must be had to the extent of the Government's authority, if any, to move for dismissal under Rule XVI and what redress there is for restoration. Such rule is of no avail to the Government because it has

been seen that only the petitioner filed and served a note of issue and such rule limits the right to move a case for trial to the party who has served a note of issue. The Government having failed to serve such note of issue was in no position to move the said case "Ready" (R. 8).

A further examination of Rule XVI reveals that if an order is granted striking a case from the calendar, it may be restored on two days' notice of motion and for good cause shown.

It necessarily follows that, under whatever rule the Government attaches any validity to its order of May 13, 1938, under Rule XI, the rule itself reads into such order "without prejudice", and Rule XVI provides that the case having been stricken from the calendar may be restored on two days' motion for good cause shown. The mistake in such case was on the part of the Trial Court, in the first instance, in granting such order, and thereafter on the part of the clerk in entering the same because there was no authority in any statute or rule which sanctioned such order or its entry.

The order of February 14, 1941, setting aside the order of May 13, 1938, and restoring the case to the calendar was therefore proper. *United States* v. *Sterling*, 70 F. (2d) 708. Said case was originally brought on the law side of the Court and was thereafter transferred to the Equity calendar. The matter was referred to a special master in February, 1928, and was submitted for decision in 1930. An order was made in June, 1932, dismissing said case for want of prosecution pursuant to General Rule XXXIII of the District Court for the Southern District of New York. The notice pursuant to rule was published in the New York Law Journal; order was made by Court, on its own motion, dismissing the suit; notice of dismissal was sent to the United States Attorney, but was not turned over to counsel for the Shipping Board. One year later, July, 1933, a motion

was made to vacate the order dismissing the cause under the aforementioned rule, which was denied. In reversing the District Court, Judge Augustus N. Hand said at page 711:

> "A mistake of the clerk, whereby the court is induced to enter a wrong judgment like a misrepresentation by a party or his counsel (even though innocent) upon which a judgment has been founded is a ground for annulling the judgment even after the term has ended. In either case the court may modify or vacate the judgment without resort to a separate suit in the nature of a bill of review. Winslow v. Staab (C. C. A.) 242 F. 426."

The Court further said at page 711:

> "While we must regard as careless the failure of the counsel in general charge of the litigation to observe the case on the general call calendar in 1932 and the failure of the United States attorney to inform counsel of the order of dismissal, notice of which was mailed to him by the clerk, there can be no justice in depriving the government of the decree in its favor because of these mistakes. They would never have been possible if the cause had not been erroneously placed on the call calendar. That initial mistake caused the whole trouble.
>
> The order of the District Court is reversed, with directions to the District Court to vacate the order of dismissal."

It will be noted that Justice Hand merely concurred in the result in our present case, which appears to present a reversal of his position in the *Sterling* case. Certiorari in the *Sterling* case was denied by this Court in 293 U. S. 593.

That part of Judge Hand's opinion in the *Sterling* case, presumably approved by this Court in denying certiorari, namely: "there can be no justice in depriving the government of the decree in its favor because of these mistakes" is more pertinent and applicable to our present case than to the facts in the *Sterling* case. There, a decision on the merits had not been rendered, and the Court was ever vigi-

lant to afford the Government the opportunity, devoid of technicality, to establish its cause of action. In our present case, judgment has been actually rendered, on the merits, and the Government raises no question as to the taxpayer's judgment on the merits.

Rule 83 of the Federal Rules of Civil Procedure empowers District Courts to make and amend rules governing its practice not inconsistent with said rules. A rule of the District Court for the Western District of Washington, relative to dismissal of action for want of prosecution (Rule 48), similar to Rule XI of our local Court herein, was held to be a validly enacted local rule under Rule 83 of the Federal Rules of Civil Procedure. *Hicks* v. *Bekins Moving and Storage Company*, 115 F. (2d) 406. The Court said at page 408:

> "Under Rule 83, therefore, it would appear that a district court has the power to provide for dismissal of causes for lack of prosecution by the court of its own motion."

Under Rule 83 and the local District Court Rules, it was in order for the Court to vacate an order striking a case from the calendar, for good cause shown.

Point III.

Circuit Court's ruling that Rule 6(b) and 6(c) of the F. R. C. P. does not suspend the operation of Rule 60(b) and empower a court to permit an act to be done after the expiration of the specified period where failure to perform same was due to excusable neglect, was error.

That the Court, in this case, considered that excusable neglect had been established, is best evidenced in the Trial Court's opinion, addressed to Government's motion to vacate, viz:

> "The motion to vacate was granted for reasons which the Court deemed sufficient." (R. 26).

Concededly, these rules were promulgated with a definite purpose in mind. At the time of their adoption this Court was familiar with the six-month limitation which was prescribed in Rule 60(b), and under most circumstances litigants were required to seek relief from judgments or orders within a reasonable time, not exceeding the aforesaid six months' period. However, the Court in adopting Rule 6(b) specifically empowered the Courts to permit an act to be done after the expiration of the period originally prescribed. This was a grant of broad discretionary power and again this Court was vigilant to prescribe the sole limit to such power, namely:

> "* * * it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as prescribed by law."

Inasmuch as the period of time prescribed in Rule 60(b) for service of a motion to relieve from an order through mistake, inadvertence, surprise or excusable neglect, is not expressly excepted, as a time which the Court cannot enlarge, it follows that such power is within the discretionary power of the Court.

Moore's *Federal Practice,* cited in the Circuit Court's opinion, on another point, states as to the effect of Rule 6(b) when considered in connection with Rule 60(b) at page 414:

> "Nevertheless, Rule 6(b) seems to give the court authority to enlarge the time to a day more than six months after the judgment, order, or proceeding was taken."

Such interpretation is given added weight by reference to the Cleveland proceedings of American Bar Association Institute at page 210. There it was specifically stated that the Court could permit an act to be done after the expiration

of the designated period for excusable neglect, with but two exceptions, both of which are embodied in Rule itself. The phraseology of the record of Proceedings of Institute in 1938 of Washington and New York Federal Rules of Civil Procedure, are instructive as to broad power of the Court under Rule 6(b). At page 83 it was said:

> "* * * and there are many other things in the rules which give them flexibility for a reasonable trial judge to administer in accordance with reason and the justice of a particular case."

The majority of the District Court decisions support Professor Moore's statement, as well as the record of proceedings at the American Bar Institute's hearings prior to their adoption. *McGinn* v. *U. S.*, 2 F. R. D. 562; *Cavallo* v. *Agwilines, Inc.*, 2 F. R. D. 526; *Preveder* v. *Hahn*, 36 F. Supp. 952; *Schram* v. *O'Connor, et al.*, 2 F. R. D. 192.

In *McGinn* v. *United States*, the Court, in 1940, allowed defendant's motion to dismiss, upon plaintiff's counsel's assent to same. Plaintiff moved to set aside such dismissal subsequent to August, 1942. Motion to vacate judgment was granted.

In *Cavallo* v. *Agwilines, Inc.*, suit was started on October 3, 1940; on December 23, 1941 an order of dismissal for lack of prosecution was entered; motion to vacate was made more than six months after entry of order. The Court, although holding that Rule 6(b) did not extend the six-months' term under Rule 60(b) nevertheless granted the relief and vacated the judgment.

In *Schram* v. *O'Connor*, the default judgment was entered September 9, 1939 and the defendant moved to set aside such judgment on July 3, 1940. The plaintiff's contention that the Court had no jurisdiction, citing Rule 60(b), was overruled in the following words at page 194:

> "* * * Therefore, so far as possible there should be a liberal interpretation of Rules and if Rule 6(b)

means anything at all it is to cover just such a case as this, provided the court finds that there was 'excusable neglect'; * * *"

"In other words, as interpreted by Burke *v.* Canfield, April 17, 1940, 72 App. D. C. 127, 111 F. 2d 526 when such a definite restriction is placed upon any further action by some rule there is nothing the district court can do to change it, but where the restriction is upon the parties themselves as under 60(b) and the court believes that it should inquire into whether the failure of either party to avail himself of some right was caused by 'excusable neglect', the court shall have that right."

In *Preveder* v. *Hahn*, plaintiff's counsel had signed stipulation consenting to dismissal on merits. Motion to vacate such order was made after six months. Court in granting order, held that applying Rules 6(b) and 60(b) to such facts authorized such an order, despite the fact that motion was made beyond the six-months' period.

There are cases which are suggestive of an interpretation contrary to the above, *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475; *Nachod & U. S. Signal Co.* v. *Automatic Signal Corp.*, 32 F. Supp. 588; *Moran* v. *Moran*, 31 F. Supp. 227, and *Cassell* v. *Barnes*, 1 F. R. D. 15; but in no event are they applicable to the facts in the present case.

In *Reed* v. *South Atlantic*, the parties had been notified pursuant to local rule of a call of the calendar and the resultant order in event of failure to take action; this procedure was not followed in our present case. Further, it is to be noted that the Court did not consider the application of Rule 6(b) when construed in conjunction with Rule 60(b).

Nachod et al. v. *Automatic Signal Co.* involved a situation where two orders were made by District Court dismissing for lack of venue and that Signal Corp. was an indispensible party. Circuit Court affirmed appeal from latter order, no appeal having been taken from former order. Later a

decision of this Court was rendered in *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, which demonstrated order in *Nachod* case was error. In denying motion to vacate, Court held that plaintiff's motion was based upon the mistake of the Court, and that Rule 60(b) only concerned itself with the mistake of a party. The Court was doubtful of its ruling on such grounds and stated that even if it had power to grant the motion it would consider the exercise of the same as unwise. In our present case, the Court not only exercised its power, but considered it a wise, as well as a proper, application of the same.

Point IV.

Court is in error in its decision that relief which petitioner sought on his motion to vacate order of dismissal could not have been afforded to him before promulgation of present rules.

Rule 60(b) contains two exceptions, the first of which is applicable hereto, viz:

> "This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding * * *"

The Circuit Court stated that it was in accord with the interpretation of the foregoing exception to Rule 60(b) as expressed in Moore's *Federal Practice*, 3255-3276 (R. 56). It also stated that it agreed with Moore that "action" was intended to cover whatever could have been done by a been accorded to him in an ancillary suit (R. 56-57).

The later substitute for the writ of coram nobis or coram vobis was a proceeding by motion. *United States* v. *Mayer*, 235 U. S. 55; Moore, 3257.

This writ could be brought after term and in some cases was allowed more than ten years after the judgment was rendered. Moore, 3257.

However, after expressing its full accord with Professor Moore's interpretation the Court said that the kind of relief that Wallace sought could not, before the Rules, have been accorded to him in an ancillary suit (R. 56-57).

This expression is in direct conflict with Moore 3257, and particularly his reference to the utilization of such writ to set aside a judgment of dismissal, taken after term, where a clerk erroneously placed the same on the calendar.[5]

In *New England Furniture* v. *Willcuts*, an improper order of dismissal was entered on April 1, 1930; a motion to vacate was brought in September, 1931, after the expiration of the term. The Court granted the motion to vacate stating that the error of the clerk was unknown to the Court, and the latter presumed it had jurisdiction to dismiss.

This case was decided in 1931, before the adoption of the present rules, and involved the identical relief sought in our present case by petitioner. It would therefore appear that the Circuit Court is not in full accord with Moore or that it has misinterpreted the statements and reasoning of such author at page 3257 and cases there cited.

In *Fidelity & Deposit* v. *Mac Gruer*, decided in 1933, a motion was made to vacate an order of dismissal "on ground that same was made through the inadvertence of some officer of the Court *or of the Court*" (italics mine). This motion was made at a subsequent term of the Court. The order was granted on the ground that such motion was in the nature of a common law writ of coram nobis or coram vobis.

In *United States* v. *Sterling*, the Second Circuit reversed an order denying plaintiff's motion to vacate an order dismissing the suit, the Court saying that a mistake of the

---

[5] *New England Furniture & Carpet Co.* v. *Willcuts*, 55 F. (2d) 983. *Fidelity & Deposit Co. of Maryland* v. *Mac Gruer, et al.*, 77 F. (2d) 83. *U. S.* v. *Sterling*, 70 F. (2d) 708.

clerk * * * is ground for annulling the judgment even after the term is ended. It further held that such order could be made without resort to a separate suit in the nature of a bill of review.

That Wallace, before the promulgation of the Rules, could have secured the relief he sought is also supported by *McGinn* v. *U. S.; Cavallo* v. *Agwilines, Inc.* (supra).

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

William B. Mahoney,
Counsel for Petitioner,
405 Walbridge Building,
Buffalo, New York.

May 20th, 1944.